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In the Supreme Court of the United States

OCTOBER TERM, 1943

BERTHA A. OWENS, Executrix of the Estate of Leyle F. Owens, deceased,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the United States Circuit Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF CASES

Page

STATUTES CITED

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PETITION FOR WRIT OF CERTIORARI

Your petitioner, Bertha A. Owens, Executrix of the Estate of Leyle F. Owens, deceased, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was commenced by petitioner under the Federal Employers' Liability Act in the District Court of the United States for the Eastern District of Washington to recover damages for pain, suffering and death of her husband, Leyle F. Owens, an employe of the Union Pacific Railroad Company as an engine foreman.

While decedent was so employed on February 16, 1939, he was engaged in participating in switching cars in defendant's yards at Spokane, Washington. A switch engine was attached to two cars and same were kicked or pushed on to him by defendant's enginemen and other employes while their view of him was obstructed by such cars and a curve in the track, without receiving any signal from him or giving him any warning whatsoever as he was crossing the track in a northerly direction in front of the cars after throwing a switch, apparently to reach a point where he could give a signal that could be seen for the movement of the engine and cars, as was the custom and practice (R. 108-114; 93; 89-92; 95-99). When the cars were kicked on to decedent he was knocked down and run over by them, inflicting mortal injuries from which he died about 2½ hours later.

It is admitted by defendant that the following Rule 30 contained in its Book of Rules was in full

force and effect:

> "Engine bell must be rung when an engine is about to move and when approaching or passing public crossings at grade, stations, tunnels and snowsheds."

The grounds of negligence alleged in plaintiff's complaint are fully set forth as subdivisions (a) to (e) inclusive (R. 4, 7, 8) among which is the following:

> "(d) That defendant and defendant's enginemen carelessly and negligently failed and neglected to ring the bell of the engine, as provided by the aforesaid rule, before moving said engine and cars or when same were about to move."

Evidence of a number of witnesses, principally defendant's employes responsible for the switching operation, was offered and received to establish that at the time the cars were being switched there was a practice and custom in the yards to look out for each other, including plaintiff's decedent, and ascertain his whereabouts before moving the cars, and that no one, including yardman Koefod, who gave a kick signal to the engineer, ascertained where decedent was before giving such signal. Evidence was further received that it was the practice and custom to receive a hand or other signal from Mr. Owens, who was in charge of the crew, before signaling defendant's engineer to kick or move the cars (R. 108-114; 92-93; 89-92; 95-99). Undisputed evidence also showed that no signal was received from Mr. Owens at the time,

and that he was given no warning of the movement that defendant's enginemen, who had complete control of the operation of the engine and the ringing of the bell (R. 199-200) failed to ring the same before moving the engine and cars or when the same were about to move (R. 138) in violation of the aforesaid Rule 30.

Respondent in its pleadings admit decedent's employment, that he was killed in the course thereof in switching cars, and that the same contained interstate commerce, denied negligence, and further alleged and claimed that Mr. Owens' death was caused by his own negligence in stepping in front of the moving cars.

This action was tried under the Federal Employers' Liability Act in accordance with its provisions so far as applicable. Sections 51-59 as amended, Chapter 2, Title 45, U.S.C.A.

Judgment entered for $10,000.00 for petitioner on April 23, 1941 (R. 247-248).

Respondent appealed to the United States Circuit Court of Appeals for the Ninth Circuit which by its judgment dated August 5, 1942, reversed plaintiff's cause (Court's opinion R. 268; 129 Fed. (2d) 1013).

Writ of Certiorari granted January 18, 1943. 317 U. S. 623; 87 L. Ed. 505.

On June 14, 1943, the Supreme Court reversed the judgment of the Circuit Court of Appeals and held

that plaintiff's decedent as a matter of law did not assume the risk of his injuries resulting in his death, and remanded the cause to said Circuit Court of Appeals for further proceedings in conformity with its opinion. 319 U.S. 715; 87 L. Ed. 1683.

The Court of Appeals took the case under advisement and on April 14, 1944, rendered its opinion wherein it treated the opinion of the Supreme Court as requiring it to pass upon other alleged assignments of error of respondent in its appeal, hereinafter referred to, and once more reversed petitioner's judgment and remanded the cause to the trial court with instructions to apply the law in accordance with the opinion of the Supreme Court and its opinion. 142 Fed. (2d) 145 (Adv. Sheets No. 2).

Jurisdiction of this Court

The statute upon which your petitioner relies to invoke the jurisdiction of this Court is Title 28, Section 347 U.S.C.A. (Judicial Code Section 240) of the United States. Your petitioner claims that her rights under the Federal Employers' Liability Act have been denied by the United States Circuit Court of Appeals.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals erred in holding that there was custom evidence proffered by respond-

ent as to the nonuse of Rule 30 in yard switching operations, on the issue of negligence against respondent.

2. The Circuit Court of Appeals erred in its construction of respondent's proffered evidence as to the nonuse of Rule 30 in switching operations and in its holding that the trial court failed to admit same, and such action constituted reversible error.

3. The Circuit Court of Appeals erred in holding that Rule 51 of the Rules of Civil Procedure did not preclude respondent due to its lack of exceptions to the court's instructions and the failure of the court to give respondent's requested instruction No. 17 (R. 236), from raising the question of the application of Rule 30 to its yards.

4. The Circuit Court of Appeals erred in holding that reversible error was committed by the trial court in instructing the jury that the non-observance of Rule 30 as to the ringing of the bell in the instant circumstances was negligence per se.

5. The decision of the Circuit Court of Appeals is in error in that the same is in conflict with the decisions of this court and the Fifth Circuit and other Circuit Courts of Appeals.

6. The Circuit Court of Appeals erred in setting aside the verdict of the jury on apparent pure technicalities and casting upon petitioner the burden of a retrial of her cause which was once decided by a jury.

PRAYER FOR WRIT

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9940 Union Pacific Railroad Company, a corporation, Appellant, vs. Bertha A. Owens, Executrix of the Estate of Leyle F. Owens, deceased, Appellee; and that said judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court and the judgment of the District Court of the United States for the Eastern District of Washington affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

BERTHA A. OWENS, Executrix of the Estate of Leyle F. Owens, Deceased, Petitioner.
By FRANK C. HANLEY,
Attorney for Petitioner.
Suite 1111 Yeon Building,
Portland 4, Oregon.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Considering Assignments of Error 1, 2 and 3 set forth in petition the evidence referred to in the opinion of the Circuit Court of Appeals wherein it claims that the trial court should have admitted proffered custom evidence upon the issue of negligence with reference to the application and non-application of Rule 30 in its yards. Such evidence referred to and the ruling of the trial court thereon is as follows:

"Q. Now, Mr. McCarthy, in your interpretation of that rule 30 as superintendent will you state whether in your opinion it applies to switching movements?

Mr. Hanley: That is objected to and calling for——

JUDGE SCHWELLENBACH: I will sustain the objection.

MR. HAMBLEN: That, of course, raises the question we have discussed. May we approach the Bench? (Colloquy at the Bench)

MR. HAMBLEN: At this time, in view of the Court's ruling on this question we will offer to prove by Mr. McCarthy that, as superintendent, Rule 30 was interpreted not to apply to switching movements in the yards, and to further show that the rule applies only to thru train movements and to movements where the street is being approached, or if there is something unusual in the yards to which the engineer wishes to call attention. That this interpretation of the rule is general throughout the Union Pacific System, and that in none of the switch yards in the Union

Pacific System, including the old yard in the city of Spokane, has the rule ever been applied to require the ringing of the bell on switching movements. In addition to that offer of proof of the above by Mr. McCarthy I wish to offer the same proof by Mr. Rutherglen, who is the safety agent of the Union Pacific system in the Northwest, and also by Mr. Pidcock who is yardmaster for the Union Pacific System in the switching yards in Spokane, and also by each member of the train crew operating at the time of the accident under Mr. Owens. And, also the same evidence will be given by Mr. F. H. Lang, who is engine foreman of one of the crews in the switching yard in Spokane.

MR. HANLEY: I object to it on the ground irrelevant, [180] incompetent and immaterial in view of the fact there is an admitted rule that governs the ringing of the bell when the engine is about to move.

JUDGE SCHWELLENBACH: I will sustain the objection in so far as the offer of proof concerns the rule and the interpretation thereof. I am not changing my ruling which I outlined to the jury to the extent if you can bring the knowledge of the custom within the yards to the knowledge of Mr. Owens. That will be admitted upon the matter of your affirmative defenses.

Q. Mr. McCarthy, was there a generally recognized practice followed in the switching yard in Spokane with reference to the ringing of the bell in switching movements? A. Yes, there is.

MR. HANLEY: That is objected to on the same ground, incompetent, irrelevant and immaterial.

JUDGE SCHWELLENBACH: The same ruling. It will be admitted at this time subject to being connected up with Mr. Owens.

Q. What was that practice?

A. In ordinary switching movements the bell is not rung except when crossing over street crossings.

MR. HAMBLEN: I think that's all." (R. 185-187)

It is the petitioner's position that the original question and offer of proof relates solely to interpretation of Rule 30 in the opinion of Mr. McCarthy and the other witnesses mentioned therein. Each witness mentioned therein, namely, Mr. McCarthy (R. 184-187), Mr. Rutherglen (R. 204-205), Mr. Pidcock (R. 195-196), F. H. Lang (R. 209-211), and also some other members of the train crew at the time of the accident to Mr. Owens, gave testimony to the effect that Rule 30 did not apply to switching movements in the yards. The entire evidence on the subject matter was before the jury and it was so recognized by respondent for the reason that respondent requested the court to give its instruction No. 17 which insofar as material is as follows:

"The plaintiff has alleged that defendant railroad company was negligent in violating Rule No. 30 of defendant's rule book requiring that the bell of the engine be rung when the engine is about to move. I instruct you in this connection that if you find from a preponderance of the evidence that said rule did not apply to operations conducted within the confines of defendent's switching yard, then said rule should not be considered further by you in this case." (R. 236).

The court did not give such instruction nor did the respondent except to the failure of the court to

give such instruction. The court did, however, in effect instruct the jury that Rule 30 applied to switch yard operations and respondent took no exception whatsoever to the charge of the Court in this respect. (R. 214-217) This same situation also applies to requested instruction No. 9 of respondent (R. 231), which instruction the court did not give nor did respondent except to the failure of the court to give such instruction.

Federal Rules of Civil Procedure Rule 51 provides in part as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The Circuit Court of Appeals in dealing with the above rule in its opinion circumvented its provisions by placing what petitioner believes to be the wrong interpretation on the proffered offer of proof by respondent. Such offer of proof does not relate to custom at all. It calls solely for the opinion of witnesses mentioned as to their interpretation of a rule, the construction of which if unambiguous is for the trial judge.

Chicago, R. I. & P. Ry. Co. vs. Ship (1909), 174 Fed. 353.

Great Northern Ry. Co. vs. Hooker, 170 Fed. 154.

Central R. Co. of N. J. vs. Young, 200 Fed. 359.

Louisville R. R. Co. vs. Mitchell (Ky.), 191 S.W. 465.

Gildner vs. Baltimore & O. R. Co. (2d Cir. 1937), 90 Fed. (2d) 635.

Pacheco vs. New York, N. H. & H. R. Co. (2d Cir.), 15 Fed. (2d) 467.

Atchison, T. & S. F. Ry. Co. vs. Ballard (5th Cir. 1940), 108 Fed. (2d) 768. Certiorari denied, 84 L. Ed. 1413, 310 U.S. 646.

The above cases are unanimous in their holding that construction of an unambiguous rule is for the court and not for a jury.

In *Chicago, R. I. & P. Ry. Co. vs. Ship*, 174 Fed. 353. Ship, an engineer on an extra freight train, jumped from his engine just prior to a collision between his train and a box car standing in the yards of defendant, and was injured as a result thereof, and brought action for damages claiming negligence on insufficient head light on engine and failure of the railway company to protect the box car on the main track with proper lights. The rules under which he was operating provided as follows:

> "Yard limits will be indicated by yard limit boards. Within these yard limits, yard engines may occupy main tracks protecting themselves against overdue trains. Extra trains must protect themselves within yard limits."
>
> "Trains must be under control when passing through station yards, where engines are employed expecting to find main track occupied."

In reversing judgment for Ship and ordering a new trial the Court held: (quoting from opinion)

> "The facts stated clearly show that Ship violated both of the foregoing rules made for his benefit, and therefore was guilty of negligence which directly contributed to his injuries. The nonobservance of these rules was negligence as a matter of law. Great Northern Ry. Co. v. Hooker (C.C.A.) 170 Fed. 154; Kansas, etc. v. Dye, 70 Fed. 24, 16 C.C.A. 604; St. Louis & S. F. Ry. Co. vs. Dewees, 153 Fed. 56; 82 C.C.A. 190; Missouri K. T. Ry. Co. v. Collier, 157 Fed. 347, 88 C.C.A. 127; Nordquist v. Great Northern Ry. Co., 89 Minn. 485, 95 N.W. 322; Scott v. Eastern Ry. Co., 90 Minn. 135, 95 N.W. 892; Brown v. Northern Pacific Ry. Co., 44 Wash. 1, 86 Pac. 1053. * * *
>
> "As in the case of Great Northern Ry. Co. v. Hooker, supra, decided by this court, so in this case, the trial court seemed to leave the interpretation of the rules above mentioned to the jury as a matter of fact. In reference to this practice the language used by Judge Van Devanter in the case last cited, is pertinent.
>
> > 'The trial court treated the interpretation of the rules prescribing the plaintiff's duty in the premises as a question of fact to be determined by the jury. But we are of opinion that it was a question of law to be determined by the court. Not only were the rules in the nature of a written instrument, but they contain no terms the meaning of which was not made plain by them; and, this being so, effect should have been given to the general rule that the interpretation of a written instrument rests with the court, and not with the jury (citing cases) * * * And it would seem that by analogy a like holding should be made when the question is one of interpretation.'"

Atchison, T. & S. F. Ry. Co. vs. Ballard, 108 Fed. (2d) 768 (5th Cir. 1940). *Certiorari denied* 84 L. Ed. 1413, 310 U.S. 646. This was an action under the Federal Employers' Liability Act by an engineer for injuries sustained when his train collided with a standing train. Negligence charged was that the fireman of the engineer's train failed to keep a proper lookout. The plaintiff himself was charged with negligence in violating defendant's specific rules, Rule 93 which provided in effect all except first class trains will move within yard limits at restricted speed, the train he was operating being other than a first class train. By Rule D-153 restricted speed was defined as "Proceed, prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced". There was a judgment for the engineer and the Railroad Company appealed. The judge throughout his charge failed to instruct the jury, as he should have done, that the violation by plaintiff of specific rules such as Rules 93 and D-153 would of itself constitute negligence, and further the charge did not properly advise the jury as to the weight to be attached to the rules, that is, as to their force and effect. (Quoting from the opinion):

> "(2-5) We think appellant is right. It is true, that a violation of company rules for the conduct of its employees, general in terms, will not ordinarily constitute negligence as matter of law. Nor will observance of such rules, as matter of law, necessarily be due care, but it will be for the jury to say, considering the rules along with the

evidence as a whole, whether there was negligence. Gildner v. B. & O. R. Co., 2d Cir., 90 F. (2d) 635; Rocco v. Lehigh Valley R. R. Co., 288 U.S. 275, 53 S. Ct. 343, 77 L. Ed. 743; Miller v. Central R. Co. of New Jersey, 2d Cir., 58 F. (2d) 635; Hall v. Chicago B. & N. R. R., 46 Minn. 439, 49 N.W. 239. *A violation of specific rules though, will constitute negligence just as their observance by others will, in relation to the violator, constitute due* care, Miller v. Central R. Co. of New Jersey, and other cases, supra. Thus, as applied to the question at issue, if the rule for keeping the train at restricted speed had stopped there, without more, it would have left the matter greatly one of judgment and it would be a question of fact under the opinion of witnesses qualified to give opinions, whether in the particular case, there was negligence in failing to observe it. But where as here, there is a precise definition of restricted speed, the question of what the rule means and requires, is a *question of law for the court*, and the evidence of plaintiff himself showing that the train was not proceeding at restricted speed within the definition, it was the duty of the court to say so, and to instruct the jury; that plaintiff was himself negligent in violating the rule of restricted speed; and that if the jury believed that that violation was the sole proximate cause of the injury, they should find a verdict for defendant." * * *

Reversed and remanded.

Considering Assignments of Error 4, 5 and 6, Rule 30 quoted in petition is a specific rule and required no extrinsic evidence to interpret same and the learned trial judge, upon whom devolved the duty of construing the rule, thought so when he stated:

"I feel there is evidence here of negligence on the part of the defendant because of the failure of

its employees to comply with the rule which the defendant company had adopted. Clearly there is a causal connection—if Mr. Owens was relying—if we presume he was taking care for his his own protection and was relying on that rule, and he had a right to rely upon thinking the bell would be rung when the engine was about to move, and the engine was close enough to him so if the bell had been rung he would have heard it, then there certainly is a causal connection between his accident and the failure to ring the bell." (R. 172)

It is therefore petitioner's position that Rule 30 was one of construction for the court and that it was specific in character, and that a violation of such rule constituted negligence per se, and the following decisions are in conflict with the opinion of the court below:

Great Northern Ry. Co. vs. Wiles, 240 U.S. 444, 60 L. Ed. 732.

Frese vs. C. B. & W. R. Co., 263 U.S. 1, 68 L. Ed. 131.

Davis vs. Kennedy, 266 U.S. 147, 69 L. Ed. 212.

Unadilla Valley Ry. Co. vs. Caldine, 278 U.S. 139, 73 L. Ed. 224.

Atchison, T. & S. F. Ry. Co. vs. Ballard (5th Cir. 1940), 108 Fed. (2d) 768. Certiorari denied 84 L. Ed. 1413, 310 U.S. 646.

Gildner vs. Baltimore & O. R. Co. (2nd Cir. 1937), 90 Fed. (2d) 635.

Lehigh Valley R. Co. vs. Mangan, 278 Fed. 85.

Chicago, R. I. & P. Ry. Co. vs. Ship, 174 Fed. 353.

Great Northern Ry. Co. vs. Hooker, 170 Fed. 154.

In the case at bar Rule 30 is a specific rule of appellant's for the operation of its road and yards and, as held in the foregoing authorities, its violation constitutes negligence as a matter of law.

In the case of *Great Northern Ry. Co. vs. Wiles, supra*, negligence charged was pulling out a draw bar of a freight train on which Wiles was employed as flagman. The freight train stopped on the main line on the time of a regular passenger train which was following and had the right of track and which Wiles knew was coming. He did not flag as provided by Rule 99. The Court in denying recovery held Wiles' failure to flag was the sole cause of the collision which resulted in his death.

The *Frese case, supra.* Frese, an engineer primarily in control of his engine, was killed in a collision with another train at a cross-over with a different railroad. Negligence charged was against his fireman who was his subordinate, for not seeing that the track was clear before crossing it. The Court in denying recovery held in effect that it was the personal duty of Frese under the Illinois statute to see that the way was clear before crossing and that negligence could not be attributed to the fireman, who was his subordinate, in the failure of Frese to perform his personal duty even though the fireman may have done more to avoid the collision.

Unadilla Valley Ry. Co. vs. Caldine case, supra. Caldine, conductor, was primarily in command of train 2. He had printed orders to take siding at Bridgewater and let train 15 from the opposite direction which had right of track, pass. Train 2 on Caldine's signal to Dibble, his motorman, left Bridgewater without taking siding and a short distance beyond collision occurred with train 15. Negligence was charged against Dibble, motorman, for obeying Caldine's signal, against station agent Dawson for not informing Caldine and Dibble again that train 2 would take siding at Bridgewater and meet 15. The Court in denying recovery held in effect that Caldine and Dibble were primarily in command and control of train 2 and had a positive meet order with train 15 at Bridgewater which they violated and such violation was the proximate cause of the collision, and that responsibility therefor could not be shifted from one to the other in enforcing liability against the employer, and that the station agent Dawson could not be found contributorily negligent for not informing them to execute an order which they already had knowledge of and were bound to obey.

We have hereinabove in this brief quoted from the Atchison and Chicago, R. I. & P. Ry. Co. vs. Ship cases which hold in effect that violation of a specific rule prescribing safe conduct for the benefit of their employes is negligence per se.

Upon the evidence in this record the rulings of the Court of Appeals complained of is plainly out of accord with the applicable decisions of this Court, some of which are:

Tiller v. Atlantic Coast Line R. Co., 87 L. Ed. 446.

New York Central R. Co. v. Marcone, 281 U.S. 345, 74 L. Ed. 892.

Seago v. New York Central R. Co., 315 U.S. 781, 86 L. Ed. 1188, reversing Seago v. New York Central R. Co., 348 Mo. 761, 155 S.W. (2d) 126.

In *Tiller v. Atlantic Coast Line R. Co.*, supra, 63 Sup. Ct. Rep. 444, 87 L. Ed. 446, decided by this Court on February 1, 1943, the action was one under the Federal Employers' Liability Act to recover for the death of Tiller, who was a policeman for the defendant railroad company. While inspecting, at night, the seals on slowly moving cars on one track, Tiller was struck and killed by a train that was backed on an adjoining track in the yard; the space between the moving cars being three feet seven and one-half inches. There was no eyewitness to the casualty. The automatic bell of the engine backing the train on the adjoining track was ringing. The rear of that train was unlighted, though a brakeman with a lantern was riding on the side away from Tiller. No special signal or warning was given.

The opinion of the Court of Appeals in the instant case is plainly out of accord with this Court's deci-

sion in the Tiller case. In this case the evidence warranted a finding of negligence attributable to the defendant employer as for failure to warn of the impending movement, as did the evidence in the Tiller case—though the evidence of negligence is here more pronounced than in the Tiller case, since it does not appear that in the latter the failure to give a special warning was a violation of a rule.

In *New York Central R. Co. v. Marcone*, 281 U.S. 345, 74 L. Ed. 892, the deceased, whose duty it was to lubricate and service engines in the defendant's roundhouse, was run over and killed by an engine that had been lubricated and serviced and was being removed from the roundhouse by an engine hostler. "There was no eyewitness to the accident" (281 U.S., l. c. 347). The deceased's body was found upon the track after the engine had passed over it. The hostler had sounded the engine whistle, but there was a brief wait thereafter before the fatal movement. There was not a word of testimony as to what the deceased was doing or attempting to do at the precise instant of the casualty. He had no further duty to perform in connection with that particular engine. This Court, in an opinion by Mr. Justice Stone, now Chief Justice, held that the case was one for the jury, and, among other things (281 U.S., l. c. 349, 350), said:

> "Any movement of an engine without warning was dangerous to life and limb. After the hostler mounted the engine, and before it was moved, sufficient time elapsed for the deceased

to come into proximity with it, which was dangerous if, as the jury might have found, he could not be seen from the engine cab by the hostler and was not warned of the impending movement. On the evidence it was for the jury to say whether petitioner exercised due care in moving the engine without a more specific and effective warning and whether failure to give it was the cause of the death."

By the same token, in the instant case the issues of negligence and proximate cause were for the jury. In the instant case, any movement of the engine without warning was dangerous to life and limb. Owens could not be seen from the engine cab by the engineer and was not warned of the impending movement, despite the fact that the rule required such warning. It follows that the decision of the Court of Appeals herein is out of accord with the decision of this Court in the Marcone case.

The Circuit Court of Appeals in its opinion cites the case of Tennant, Admx. vs. Peoria & Pekin Union Ry. Co., L. Ed. Advance Opinions, Vol. 88, p. 322, wherein a similar rule was involved as in the case at bar. The questions presented by this petition are not similar to the questions presented in the Tennant case as in the Tennant case the question before the court was one of proximate cause and while the court also considered the question of negligence, it accepted the record of testimony as it stood and concurred with the court below that there was sufficient proof of negligence.

CONCLUSION

WHEREFORE petitioner prays this Court to grant the writ that her rights under the Federal Employers' Liability Act may be protected.

Respectfully submitted,

FRANK C. HANLEY,
Attorney for Appellee.